IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26.10.2006

Coram

The Honourable Mr.Justice P.D.DINAKARAN
and
The Honourable Mr.Justice P.P.S.JANARTHANA RAJA

T.C.(A) No.2446 of 2006

Commissioner of Income-Tax
Chennai. ... Appellant

Vs.

M/s.Pathy Cine Enterprises
No.133, Kodambakkam High Road
Chennai-34. ... Respondent

PRAYER: Appeal under Section 260A of the Income-Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, dated 17.3.2006 made in I.T.A. No.1249/Mds/2004 for the assessment year 2000-01.(C.No.3033/41-42/III/2003-04 dated 5.3.2004 on the file of the Commissioner of Income-Tax, Chennai-III, Chennai -34 against PAN AACCP 4182F on the file of the Income-Tax Officer, Company Ward V (i), Chennai).

For Appellant : Mrs.Pushya Sitaraman
Sr. Standing Counsel for I.T.

J U D G M E N T

(Delivered by P.D.DINAKARAN, J.)

In this appeal directed against the order dated 17.3.2006 of the Tribunal made in ITA No.1249/Mds/2004, the following questions were formulated as substantial questions of law arising for consideration:

(i)Whether in the facts and circumstances of the case, the Tribunal was right in holding that income from hiring of air conditioners to its directors as "income from business" ? and

(ii)Whether in the facts and circumstances of the case, the Tribunal was right in holding that the exercise of power under Section 263 of the Income Tax Act by the Commissioner of Income Tax was erroneous ?"

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2.1. To learn as to how these questions arose, we may refer, in brief, to the facts of the case:

The relevant assessment year is 2000-2001. The assessee admitted the lease rent received from M/s.Blue Star Ltd., as "income from house property" after allowing the statutory deductions. The assessee also admitted "net loss" of Rs.5,75,580/- as "income from business" derived from the business of hiring of air conditioners. The Assessing Officer accepted the income as shown in the return.

2.2. Alleging under assessment of income by the assessee, the Commissioner of Income Tax issued a notice dated 8.1.2004 under Section 263 of the Income Tax Act (for brevity, "the Act"), to show cause as to why the order of assessment should not be revised, thereby proposing to treat the income derived from the hiring of air conditioners to the marriage halls belonging to the Directors of the assessee/company as "income from other sources".

2.3. In response to the said show cause notice, the assessee submitted that the only business of the assessee from its inception since two decades was leasing of air conditioners and the lease was initially made to M/s.Blue Star, Chennai and M/s.Syndicate Bank, Chennai and after expiry of the lease to these two concerns, the assessee/ company leased out the air conditioners for use in the marriage hall owned by one of Directors and therefore, there was a continuous business activity of leasing of machinery during the previous year ending 31.3.2000 and consequently, the expenditure debited to the income and expenditure account were actually incurred wholly and exclusively for the conduct of the business.

2.4. The Commissioner, however, in his order dated 5.3.2004, held that the assessee never had carried on any organised and systematic activity of the business of hiring of air conditioners and refused to grant the statutory allowance under the head "income from house property" and held that the expenses claimed have no nexus with rental income from hiring of air conditioners and accordingly, treated the income from hiring of air conditioners as "income from other sources".

2.5. On appeal by the assessee, the Tribunal, appreciating the explanation offered by the assessee, that the assessee/company was pursuing the business as per the main object clause of its memorandum of association and that the assessee has been doing the same line of business and submitting its returns consistently on the same basis for nearly two decades, came to the conclusion that the only difference which arose is that earlier the air conditioners were hired to other parties and during the impugned assessment year, the assessee had hired the air conditioners to marriage hall run by one of its Directors and as a consequence, set aside the revision

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order under Section 263 of the Act. Hence, the above appeal raising the substantial questions of law referred to above.

3. Since the second question of law raised forms the basis for deciding the issues in this appeal, we propose to deal with both the questions jointly.

4. It is apt to refer Section 263 of the Income Tax Act, which provides a revision jurisdiction to the Commissioner to revise the orders prejudicial to the Revenue. Section 263 of the Income Tax Act reads as under:

"Section:263. Revision of orders prejudicial to revenue.-

(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation.-For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988, by the Assessing Officer shall include--

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120 ;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner ;

(c) where any order referred to in this sub-section and

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passed by the Assessing Officer had been the subject matter of any appeal, filed on or before or after the 1st day of June, 1988 the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.-In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be re-heard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

(emphasis supplied)

5. The Apex Court in Malabar Industrial Co. Ltd., v. Commissioner of Income Tax, [2000] 243 ITR 83 considered the scope of the revisionary jurisdiction of the Commissioner of Income Tax under Section 263 Act for revising the orders prejudicial to the revenue and held as under:

"A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous ; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent—if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue—recourse cannot be had to section 263(1) of the Act.

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption

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of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy and Co. v. S. P. Jain [1957] 31 ITR 872, the High Court of Karnataka in CIT v. T. Narayana Pai [1975] 98 ITR 422, the High Court of Bombay in CIT v. Gabriel India Ltd [1993] 203 ITR 108 and the High Court of Gujarat in CIT v. Smt. Minalben S. Parikh [1995] 215 ITR 81 treated loss of tax as prejudicial to the interests of the Revenue.

...

The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue ; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 (SC).
"

(emphasis supplied)

6. After referring to the facts and the law enunciated in the decision referred supra, it is clear that what was not prejudicial to the revenue for two decades cannot be construed as prejudicial to the revenue for the impugned assessment year, merely because the lessee happens to be one of the Directors of the assessee/company, as it is well settled that the phrase "prejudicial to revenue" must be read in conjunction with an erroneous order. In any event, when there are sufficient materials to support the claim of the assessee to treat the income derived from the hiring of air conditioners as business income for over two decades, the Commissioner has no authority to invoke the revisionary jurisdiction under Section 263 of the Act, merely on surmise that the order of the assessing

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officer is erroneous or the order is prejudicial to the revenue, on the ground of change of the lessee. Hence, in our considered opinion, the Tribunal had rightly held that the Commissioner had erroneously exercised the power under Section 263 of the Act.

7. That apart, it is well settled in law vide Smt.Kavit Sanghi v. CIT,[1982] 133 ITR 48 that, in the absence of any material to show that the air conditioning plant was not acquired by the assessee as a commercial asset and was acquired for any other purpose by the assessee, the income derived from the hiring of the air-conditioning plant was chargeable as profits and gains from business and not as income from other sources.

8. In the instant case, as referred to in the order of the Tribunal, the object clause of the Memorandum of Association of the assessee/Company specifies the object of the company is to carry on the business of running cinema house and lease out the climate control device and other machineries and as the assessee could not get the no objection certificate for running the cinema house, it was carrying on the business by regularly leasing out the air conditioners. Merely because of the change in the parties to whom the air conditioners were leased, in our considered opinion, would not be a conclusive premise to change the assessment of the same from the head "business income" to "income from other sources".

For the reasons aforesaid, finding no substantial question of law arises, this appeal is dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To:

1. The Assistant Registrar,
   Income-tax Appellate Tribunal,
   Rajaji Bhavan, Besant Nagar,
   Chennai 600 090

2. The Commissioner of Income-tax
   Chennai-III, Chennai.

3. The Commissioner of Income Tax,
Chennai.

4.The Income Tax Officer,
Company Ward V(i), Chennai.

+1cc to Mrs.Pushya Sitaraman,Advocate Sr 50139

JRG (CO)
km/29.11.

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